IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 25, 2008

STATE OF TENNESSEE v. FRANK EDWARD DAVIDSON

Appeal from the Criminal Court for Cumberland County
No. 9652 Leon C. Burns, Jr., Judge

No. E2007-02841-CCA-R3-CD - Filed September 10, 2008

The State appeals after the trial court granted a motion to suppress evidence obtained following a traffic stop of Appellee, Frank Edward Davidson, that ultimately led to his indictment for driving under the influence ("DUI"), driving on a revoked license, driving with a restriction in effect, DUI tenth offense, and driving on a revoked license second offense. After a review of the record and the DVD of the traffic stop, we determine that the evidence preponderates against the judgment of the trial court. Consequently, the judgment of the trial court is reversed and the case is remanded for trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Reversed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Bill Gibson, District Attorney General; and Amanda Hunter, Assistant District Attorney General, for the appellant, State of Tennessee.

David N. Brady, District Public Defender and Cynthia S. Lyons, Assistant Public Defender, for appellee, Frank Edward Davidson.

OPINION

FACTUAL BACKGROUND

On May 8, 2007, the Cumberland County Grand Jury issued a multi-count indictment charging Appellee with one count of DUI, one count of driving on a revoked license, one count of

driving with a restriction in effect, one count of DUI tenth offense, and one count of driving on a revoked license second offense.

Subsequently, counsel for Appellee filed a motion to suppress the evidence, arguing that the vehicle was stopped without probable cause or reasonable suspicion and that all evidence concerning the offense was gathered as a direct result of the impermissible stop. At a hearing on the motion to suppress, the trial court heard the testimony of Lieutenant Tony Davis of the Crossville Police Department.

Lieutenant Davis testified that he had been with the Crossville Police Department for fourteen years and was a DUI instructor for the police department. According to Lieutenant Davis, he received a call from dispatch that a "male subject" had fallen in a bar parking lot and then got into a maroon or red car. It was reported that the car was "at the drive-thru at the tobacco store." Lieutenant Davis was working an accident across the street in the parking lot and saw the red car "next door." Lieutenant Davis followed Appellee in traffic. Appellee changed lanes but failed to signal. Lieutenant Davis stated that he then saw Appellee's "left two tires" go "across the center line four times, [s]o [he] activated [his] lights to affect a traffic stop." Appellee was not speeding.

The trial court viewed the footage from the in-dash camera in Lieutenant Davis's vehicle.[1] Lieutenant Davis testified that the DVD was an "Accurate representation of what [he] was seeing at the time."

At the conclusion of the hearing, the trial court granted the motion to suppress. Specifically, the trial court determined:

> It is true that we don't give up our Fourth Amendment Rights when we are behind a wheel. The case that was cited does talk about the fact that we do not have to drive a perfect vector down between the lines, and a touching of the line is something that I suspect that we all do from time to time. I don't think Officer Davis has stretched it much by saying that he might have gone over the line, but it doesn't come across the line, but it doesn't come across that well in the video, unfortunately for him.
>
> What my feeling here is, that basically we're stopping because we got a call as opposed to seeing any bad driving. It's a close case, it seems to me, but based upon the allegations here, for a long time the man was followed, there was really no problem with the driving. There was maybe one time that we could clearly see, without the shadows of the trees and so forth, that he might have been certainly over on the line. He might have been across the line, but it was barely across the line, if at any time, it seems to me. On the four alleged occasions he was across the line, it is very difficult to see, but certainly the indication is, that he wasn't so far over the

[1] It does not appear from the record that the State formally introduced the videotape footage of the in-dash camera into evidence.

> line that the wheels of the left - - the left wheels were way over the line. If they were over the line, they were just barely over the line, it seems to me, based upon what I saw.
>
> This is a horrible case, and a pretty serious case with which he's been charged: a multiple offense DUI, and violation of an Habitual Offender Order. And [Appellee] is no stranger to the system. And I suspect, if your picture is not on the wall down there to be aware that [Appellee] has no license to drive, it ought to be on the wall down there.
>
> But under the - - what I have seen, I don't think that there's enough reasonable suspicion to stop in this case, so I'd have to grant your motion to suppress the evidence. Now, obviously, that takes care of the severance motion.

The State appeals, arguing that the trial court improperly granted the motion to suppress.

Analysis

On appeal, the State contends that the evidence preponderates against the trial court's ruling to suppress the evidence obtained as a result of the traffic stop. Specifically, the State argues that the proof supports more than one incident of more than mere imperfect driving or inattention to detail by Appellee on a road that was relatively straight. In contrast, Appellee contends that this Court should utilize a preponderance of the evidence standard to determine that the trial court correctly concluded that there was "insufficient reasonable suspicion" to stop Appellee's vehicle.

Initially, Appellee posits that the DVD of the traffic stop was never admitted into evidence by the trial court and should, therefore, not be considered by this Court on appeal. In rebuttal to that argument, the State cites *State v. Smotherman*, 201 S.W.3d 657, 661 (Tenn. 2006), in which the Tennessee Supreme Court determined that the absence of a transcript of a suppression hearing from the appellate record and the failure to admit a search warrant and affidavit into evidence did not preclude appellate review of the documents where the record on appeal clearly established that the trial court reviewed and considered the documents. The transcript of the hearing herein does not indicate that the DVD of the traffic stop was actually admitted into evidence as an exhibit. However, it is clear that the trial court viewed the DVD and relied on its contents in making its decision on the motion to suppress. As in *Smotherman*, the DVD at issue herein was included in the appellate record and was certified and provided by the Clerk of the Circuit Court of Cumberland County to the Court of Criminal Appeals. The technical record certification even states that the "Exhibit . . . [was] authenticated by the Trial Judge or as provided in T.R.A.P. Rule 24(f)." *See* 201 S.W.3d at 661. Further, we find no evidence to suggest that the DVD included in the record is not the DVD that was viewed by the trial court in granting the motion to suppress. The DVD contains a time and date stamp reflecting the date of the traffic stop and there is information on the DVD that informs the watcher that the information was taped from Lieutenant Davis's patrol car. In *Smotherman*, the court determined that:

> [A]ny matter that the trial court has appropriately considered is properly includable in the appellate record pursuant to Rule 24(g) of the Tennessee Rules of Appellate Procedure when the matter is "'necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.'"

201 S.W.3d at 661 (quoting *State v. Housler*, 167 S.W.3d 294, 298 (Tenn. 2005)). Again, the record on appeal establishes that the trial court considered and reviewed the DVD in granting the motion to suppress. The trial court referred to the DVD in its findings of fact and conclusions of law. Consequently, the DVD may be considered on appellate review.

Moving on to the issue of the motion to suppress, we note that this Court will uphold a trial court's findings of fact in a suppression hearing unless the evidence preponderates otherwise. *State v. Hayes*, 188 S.W.3d 505, 510 (Tenn. 2006) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. Our review of a trial court's application of law to the facts is de novo, with no presumption of correctness. *State v. Walton*, 41 S .W.3d 75, 81 (Tenn. 2001) (citing *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)). When the trial court's findings of fact are based entirely on evidence that does not involve issues of witness credibility, however, appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions and the trial court's findings of fact are subject to de novo review. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000).

Both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution protect individuals against unreasonable searches and seizures by government agents.[2] *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. "These constitutional provisions are designed to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" *Keith*, 978 S.W.2d at 865 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). The Tennessee Supreme Court has noted previously that "Article I, [section] 7 [of the Tennessee Constitution] is identical in intent and purpose with the Fourth Amendment [of the United States Constitution]," and that federal cases applying the Fourth Amendment should be regarded as "particularly persuasive." *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968).

Under both constitutions, "a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that

[2]The Fourth Amendment is applicable to the states pursuant to the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *Yeargan*, 958 S .W.2d at 629 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)); *see also State v. Garcia*, 123 S.W.3d 335, 343 (Tenn. 2003). A police officer's stop of an automobile constitutes a seizure under both the United States and Tennessee Constitutions. *See Whren v. United States*, 517 U.S. 806, 809-10 (1996); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Vineyard*, 958 S.W.2d 730, 734 (Tenn. 1997). Further, our supreme court has stated that "[w]hen an officer turns on his blue lights, he or she has clearly initiated a stop . . . [and the vehicle's driver is] 'seized' within the meaning of the *Terry* [*v. Ohio*, 342 U.S. 1 (1968)] decision." *State v. Pulley*, 863 S.W.2d 29, 30 (Tenn. 1993). Therefore, to be considered "reasonable," a warrantless stop of a driver must fall under an exception to the warrant requirement.

One of these narrow exceptions occurs when a law enforcement officer stops an automobile based on probable cause or reasonable suspicion that a traffic violation has occurred. *Whren*, 517 U.S. at 810; *State v. Randolph*, 74 S.W.3d 330, 334 (Tenn. 2002); *Vineyard*, 958 S.W.2d at 734. If the officer has probable cause to believe that a traffic violation has occurred, any seizure will be upheld even if the stop is a pretext for the officer's subjective motivations in making the stop. *See Whren*, 517 U.S. at 813-15; *Vineyard*, 958 S.W.2d at 734-35. Another such exception occurs when a law enforcement officer initiates an investigatory stop based upon specific and articulable facts that the defendant has either committed a criminal offense or is about to commit a criminal offense. *Terry*, 392 U.S. at 20-21; *Binette*, 33 S.W.3d at 218. This narrow exception has been extended to the investigatory stop of vehicles. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992). In evaluating whether the law enforcement officer had reasonable suspicion to justify an investigatory stop, this Court must consider the totality of the circumstances, which includes the personal observations and rational inferences and deductions of the trained law enforcement officer making the stop. *See Terry*, 392 U.S. at 21; *Binette*, 33 S.W.3d at 218; *Watkins*, 827 S.W.2d at 294. Objective standards apply, rather than the subjective beliefs of the officer making the stop. *State v. Norword*, 938 S .W.2d 23, 25 (Tenn. Crim. App. 1996). "'The officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or hunch.'" *Yeargan*, 958 S.W.2d at 632 (quoting *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989)). This includes, but is not limited to, objective observations, information obtained from other police officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders. *Watkins*, 827 S.W.2d at 294 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). A court must also consider the rational inferences and deductions that a trained police officer may draw from the facts and circumstances known to him. *Terry*, 392 U.S. at 21.

In the case herein, it is clear that Appellee was "seized" within the meaning of the state and federal Constitutions. Lieutenant Davis testified that he turned on his lights in order to stop Appellee's vehicle. Thus, in order for the stop to be constitutionally valid, at the time that Lieutenant Davis turned on his vehicle's blue lights, he must have at least had reasonable suspicion, supported by articulable facts, that Appellee had committed, or was about to commit an offense.

According to Tennessee Code Annotated section 55-8-103, appearing in Chapter Eight entitled "Operation of Vehicles - - - Rules of the Road," "[i]t is unlawful and, . . . a Class C misdemeanor, for any person to do any act forbidden or fail to perform any act required in this chapter and chapter 10 of this title." Tennessee Code Annotated section 55-8-121, entitled "No Passing Zones" provides that:

> The department of transportation is hereby authorized to determine those portions of any highway where overtaking and passing or driving to the left of the roadway would be especially hazardous and may by appropriate signs or markings on the roadway indicate the beginning and end of such zones. When such signs or markings are in place and clearly visible to an ordinarily observant person, every driver of a vehicle shall obey the directions thereof.

Furthermore, Tennessee Code Annotated section 55-8-123 mandates that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" whenever a roadway has been divided into two or more clearly marked lanes for traffic.

After reviewing the DVD several times, we conclude that the evidence preponderates against the trial court's decision to grant the motion to suppress. In our view, it appears from the DVD that Appellee's left tires crossed completely over the yellow line into the turn lane at least one time. After the turn lane became a double yellow line, it appears on the DVD that Appellee crossed the double yellow lines at least one time immediately before a semi-truck passed him in the opposite direction. Even if Appellee only crossed the double yellow lines one time, that evidence in and of itself would equate to probable cause to initiate a traffic stop under Tennessee Code Annotated sections 55-8-121 or 55-8-123. Taking the actual observations of Lieutenant Davis in conjunction with the information that Lieutenant Davis received from dispatch about a male falling in a bar parking lot before getting behind the wheel of a maroon or red vehicle that was then seen at the tobacco store, leads us to the conclusion that Lieutenant Davis had at least reasonable suspicion to affect a traffic stop herein. We acknowledge, as did the trial judge, that this case presents a close call on the issue of the legality of the stop. However, after Appellee was stopped, the evidence on DVD certainly supports probable cause to arrest Appellee for DUI. He was unable to recite the alphabet, stumbled while he was walking, admitted to driving on a revoked license, and told Lieutenant Davis that he spilled a beer on his pants, among other things. This evidence would have been admissible had the trial court denied the motion to suppress. We determine that the trial court erred in granting the motion to suppress where there was at least reasonable suspicion to affect the traffic stop. Accordingly, the judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

Conclusion

For the foregoing reasons, the judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

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JERRY L. SMITH, JUDGE